

**Tom Biglen**  
**Testimony in support of SB 236**  
**Wednesday, March 25, 2009**

My name is Tom Biglen. I grew up in Big Timber and after college and three years in the Army with a Vietnam tour, I returned home to Big Timber and live there now. I was elected Sweet Grass County attorney in 1982 and served until 1997. I handled every type of case, from misdemeanors to violent crimes.

I want to share with you my understanding of the complexities surrounding death penalty cases in our state.

First of all, between 90 to 95% of criminal felony cases end up in some sort of plea agreement. The Court system would be buried without plea-bargaining, and it is necessary.

But to work, plea-bargaining must be fair and adhere to legal standards. The prosecutor and judge are guided by their obligations as officers of the Court, and representatives of the State to exercise their highest fidelity to legal principles and to adhere to justice.

I have heard it said that if we abolish the death penalty we take away a prosecutor's main bargaining chip. Using the death penalty as a tool in getting a plea bargain is not necessary to get convictions. I believe you have a letter in your packet of materials today that is from the former Attorney General of Massachusetts—a state without the death penalty. Massachusetts has the most people serving life without parole in the country and has never used the death penalty as a bargaining chip.

New Jersey prosecutors say they have had no problems getting convictions and appropriate sentences in their first year without a death penalty.

A prosecutor must file his intent to seek the death penalty early in the process, so from the start, he is mired in all the complexities of a death penalty case. There are unique motions, more investigations, special defense attorneys, and on and on. The so-called "bargaining chip" in fact becomes the burden of an extraordinarily costly process. If a prosecutor has the evidence to go to a death penalty trial, you can bet he has the evidence to convict on a homicide of life without parole. And if a defendant wants to go to trial, well OK. It's still costs less to go through a trial seeking life without parole than starting a prosecution with a death penalty threat.

Plea-bargaining is not gamesmanship. Making threats of death as punishment to get a plea is, frankly, morally repugnant, and it does not serve the highest standards of prosecutorial conduct that every attorney, every judge, and every law enforcement person should strive for.

What threatening the death penalty does is risk the integrity and reliability of our judicial process. We have learned that most profoundly this year with the exoneration of 6 young Nebraskans who were threatened with the death penalty and confessed to a murder they did not commit.

Seeking the death penalty is not just a problem in the beginning, it comes with all sorts of problems that continue for decades. As a prosecutor, it was part of my duty to seek justice for victims of crimes, and that decades-long process does not serve those victims. Seeking the death penalty gives victims' families a false promise of an execution that almost never happens. If a victim's family member wants the death penalty, the reality is most likely that the sentence will get reduced on appeal or drag on for years with no execution in sight. In one current Montana case we're into our 26<sup>th</sup> year of appeals. A family member that may want a death penalty at first, ends up spending a good part of their life caught up in an excruciatingly slow and uncertain process with little or no chance of reaching finality.

Rather than setting families up for an unlikely result, it serves justice and the families to start with a realistic understanding of the process. When the prosecutor can say to the family "we are going to put this person away for the rest of his life, and every day of the rest of his life he is going to pay for this heinous crime"—the prosecutor is telling the family something that is realistically possible, there are no false expectations for victim's family. This, more than any other single item, in my estimation starts the family on the road to recovery and acceptance.

Beyond the emotional cost to victims' families, the complexities of a death penalty trial have significant costs to counties. The prosecution of *any* violent crime strains a small county's finances and budgets, but when you have a death penalty case, you are talking about possibly bankrupting a small county.

While I was county attorney I watched my small county struggle every year to provide adequate funds to its law enforcement agencies. One capital case, just one, can devastate a small county's budget. Even the not-so-small counties, like Gallatin County, experienced the devastating price tag of a capital case in just the last few years. Funds that could have gone for law enforcement to provide public safety instead go to the costs of death penalty prosecutions, determination of penalty, and appeals, and appeals, and appeals, which more often than not end up being kicked out of the death penalty status anyway.

When law enforcement, social services, and mental health have adequate funds, people on the edge are identified earlier, helped earlier and prosecuted earlier, and without any doubt in my mind, that assists in the prevention of capital crimes as well as provides for the safety of our Montana citizens as laid out in Montana's Declaration of Rights.

EXHIBIT 14  
DATE 3/25/09  
SB 236

BOCA RATON  
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NEW ORLEANS  
NEW YORK  
NEWARK  
PARIS  
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## PROSKAUER ROSE LLP

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March 16, 2009

Representative Ron Stoker  
Chair, Judiciary Committee  
Montana House of Representatives  
PO Box 200400  
Helena, MT 59620

Dear Chairman Stoker and Members of the House of Representatives:

It has come to my attention that your chamber will be taking up repeal of the death penalty this month. Having observed the death penalty debate in this country for many years, I know that many questions arise about states without the death penalty fare on certain public safety issues. Will it be harder to get plea bargains without the death penalty? Will repeal endanger corrections officers in prisons? Will life without parole sentences become more costly and time consuming without the death penalty? As the former Attorney General from Massachusetts, a state without the death penalty, I want to answer those questions for you from direct experience. The short answer to all of those questions is a resounding *no*.

First, a bit about my background: I served as an elected chief law enforcement officer in this Commonwealth, one that does not have the death penalty, for 16 years, as both a District Attorney and as Attorney General. As District Attorney of Middlesex County (the largest county in the state, larger than that of 13 states) from 1983-1991, I established a state and national reputation for being tough on crime, and a strong supporter of police and victims. I also implemented major initiatives in the areas of priority prosecutions, child abuse, domestic violence, drug and alcohol abuse, and public corruption. As the Attorney General of Massachusetts for two terms, from 1991-1999, I also served as President of the National Association of Attorneys General (NAAG), created a student conflict resolution/violence prevention project (SCORE) that earned a Ford Foundation Excellence in Government Award, and received national praise for our Safe Neighborhoods Initiative to reduce urban crime and violence. From 2003-2005, I chaired, at the request of then Governor Mitt Romney, the Governor's Commission on Corrections Reform, formed after the murder of a defrocked priest in a maximum security prison, giving me the opportunity to look comprehensively at the issues of prison safety and prison violence.

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(<http://www.mass.gov/Eeops/docs/eops/GovCommissionCorrectionsReform.pdf>;  
<http://www.mass.gov/Eeops/docs/doc/docfinalreport.pdf>)

In short, I am no stranger to law enforcement and crime fighting.

As Montana considers repeal of the death penalty, I would like to offer you my view that eliminating the death penalty will *have no negative impact* on community, police, victim, or prison safety. It will *not* hinder the prosecutorial capacity to seek, or the court's ability to impose, "life without parole" sentences for serious, heinous crimes and criminals. And it will *not* increase the amount of time and resources required to pursue "life without parole". As I comment a bit more in these general statements, allow me to note that I yield to no one in being tough on crime, but I also believe we must be smart about crime and law enforcement.

Let us be very clear - whatever your views on the death penalty as punishment, retribution, deterrent or as a necessary moral or symbolic gesture, it has nothing to do with our capacity to fight serious crimes and keep communities safe. It does not get kids out of gangs, nor get guns off the street; it does not prevent drug and alcohol use and abuse; nor does it deter domestic or family violence, white collar crime or public corruption - all of which are the major causes of crime and violence. In other words, the death penalty's existence - or non-existence - does not keep or make the police, victims, prisoners or our communities safe. Unfortunately, in my experience, capital punishment has often been advocated more as a symbolic gesture or magic panacea than as a practical value added in the reality of tough, efficient, effective professional law enforcement, prosecution, punishment, or prisons.

That said, allow me to address a few specific issues that states considering repeal often grapple with: First, Massachusetts has one of the highest percentages of prisoners serving life without parole sentences in the country, and, in my professional career, everyone of those sentences was imposed without the threat of the death penalty. (The last time we had a death penalty here was in 1982-84, for a brief period before the state Supreme Judicial Court struck it down.) In my own experience as a prosecutor, I never found that I needed the death penalty to secure the appropriate or maximum punishment.

Second, and just as important, there is a dramatic difference in the prosecutorial resources used in "life without parole" versus death penalty cases, even when "life without parole" is the highest punishment. The death penalty faces far more complicated due process and fairness issues/hurdles under our Constitution precisely because death is irreversible. Rightly or wrongly, we all have a heightened concern to ensure fair and equal treatment - and appellate review - in these cases, and they are subject to a higher degree of reversal and remand than any other cases.

The imposition of "life without parole" in Massachusetts, while subject to strict due process and legal/constitutional scrutiny, has never been hamstrung by the extraordinary constitutional review that death cases rightfully receive: the sentence doesn't require two trial

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phases; it doesn't require us to "death qualify" juries; it doesn't require separate appellate divisions or resources for prosecutors, defenders, or appeals courts; nor does it require a heightened focus on the quality of defense counsel. Appeals are certainly filed, as they are in cases from burglary to life *with* parole cases, but they are all handled in the ordinary course - with great seriousness but with a far lower success rate (if prosecutors are doing their job well). Most of these appeals are filed and convictions affirmed, as are the majority of criminal appeals.

Equally important, the sentence itself is *not* delayed when a life without parole appeal is filed. The offenders continue to serve their sentence regardless of the court process. In death cases, on the other hand, every filing means the sentence is delayed yet again. While appeals in all cases are difficult on victims' families, the toll on families waiting for that sentence to finally begin is tremendous - and utterly unique to death penalty cases.

Third, when it comes to prison safety, the death penalty really has nothing to do with it. Given the professionalism of the leadership of most state corrections systems today, and the availability of comprehensive "Best Practices" for almost any managerial aspect, as we learned on the Commission, staffing and resources for oversight, training, accountability and programming are the key to safe prisons and safe prison working and living environments. When prisons are well managed, corrections staff are able to properly classify prisoners so that those who are a threat can be dealt with *before* they commit a crime in prison. When prisons are understaffed or where staff lack the capacity, resources, and training to make appropriate classification decisions, then conditions that foster prison violence arise. The existence or nonexistence of the death penalty is largely irrelevant. In fact, it is likely to exacerbate the pressure on the rest of the system in a time of limited fiscal resources.

In short, I strongly believe that not having the death penalty in Massachusetts has been better for victims' families, for prosecutors, courts and law enforcement, and for public safety in general. The death penalty consumes an enormous amount of time, effort, energy, and resources, with minimal, if any, public safety return. It's painful for the families, and it's all-consuming for the prosecutors. In fact, when Massachusetts Governors have proposed reinstating the death penalty, there has always been some significant prosecutorial resistance, even by those prosecutors who support - or do not oppose - the death penalty, because it would impose a major burden with little return and could require a significant diversion of limited resources from major crimes.

The truth is that fewer than 10% of the criminals commit over 70% of the serious crime in all of our states. The death penalty distracts and diverts our energy and resources from dealing with serious repeat offenders who cycle through the system over and over again, committing heinous crimes that *don't* involve murder and thus aren't even *death eligible*. I believe it is tough and smart to take the death penalty off the table and ensure we are investing all our crime-fighting efforts in dealing with crimes and offenders who threaten the quality of our lives. No death is excusable or justifiable. The most effective penalty and punishment is swift, fair and

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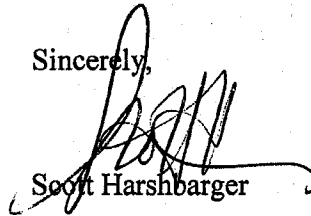
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certain justice. And life in prison is just that - and may even be more punishment, at less cost with a greater public safety return.

If I can answer any questions for you, please don't hesitate to ask. I would be happy to speak with any legislator directly.

Good luck, and I encourage you to vote for repeal of the death penalty.

Sincerely,

A handwritten signature in black ink, appearing to read "Scott Harshbarger", with a stylized flourish at the end.

Scott Harshbarger

cc: Members of the Montana House of Representatives